IN THE

SUPREME COURT OF THE UNITED STATES

No. 1399

D. H. OVERMYER WAREHOUSE COMPANY, INC.,
Petitioner,

vs.

MAX L. KUNIANSKY,
Respondent.

BRIEF

Opposing Grant of Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1393

D. H. OVERMYER WAREHOUSE COMPANY, INC.,
Petitioner,

vs.

MAX L. KUNIANSKY,
Respondent.

BRIEF

Opposing Grant of Writ of Certiorari

In its "Reasons for Grant of Writ", petitioner in certiorari contends, **first**, that it was denied due process of law because the District Judge in assessing damages found an amount in between the amount he necessarily would have found had he accepted the opinions of petitioner in certiorari's witnesses and the amount he necessarily would have found had he accepted the opinion of respondent who qualified as an expert witness, and, **second**, because the District Judge refused to follow controlling decisions of the Supreme Court of the State of Georgia.

We respectfully submit that neither of these reasons is sound.

The measure of petitioner in certiorari's damages was the difference in the value of the building as constructed

by respondent and what its value would have been had respondent constructed it in accordance with his contract. **Small v. Lee Brothers, 4 Ga. App. 395; Kendrick v. White, 75 Ga. App. 307.**

It is well settled in Georgia, and in all other jurisdictions insofar as we have been able to ascertain, that where the amount of damages to be assessed depends upon the value of property, triers of fact are not bound to accept and base their findings on the opinion of a witness as to value, even though it be uncontradicted. In determining the question, triers of fact may, and should, take into consideration all of the evidence in the case which throws any light on the subject, and may draw from their own experience in fixing the amount of damages when there is in evidence sufficient facts and data from which they may reach a legitimate conclusion.[1] In such cases, the triers of fact have freedom to select any figure within the range of the testimony.[2]

When he came to assess damages in the case at bar, the District Judge had before him the testimony of petitioner in certiorari's expert witnesses that in their opinion the difference between the value of the building as constructed and what would have been its value had it been properly constructed, was $95,000.00; the testimony of respondent that in his opinion the difference in value was only $8,000.00, and evidence showing the following facts which threw light on the amount of damages:

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[1] Dixon v. Cassels Co., 34 Ga. App. 478; National Ben Franklin Fire Insurance Co. v. Purvis, 61 Ga. App. 674; Watkins v. Tompkins Chevrolet Co., 83 Ga. App. 440 (3); Grant v. Dannals, 87 Ga. App. 389; Imperial Investment Co., Ltd. v. Modernation Construction Co., 96 Ga. App. 385 (3); Sun Life Ins. Co. v. League, 112 Ga. App. 625 (626); Hoard v. Wiley, 113 Ga. App. 328 (3). Also: The Conqueror, 16 U. S. 110; Head v. Gargraves, 105 U. S. 45 (50), and cases cited; Welch v. Tennessee Valley Authority, 108 Fed. (2) 95; 32 C. J. S. (Evidence) 568.

[2] Southern Cotton Oil Co. v. Thames, 155 Ga. 99 (8).

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(1) Respondent had agreed to construct and sell to petitioner in certiorari the land and building for a total price of $458,159.00 [Complaint, Exhibit C]; (2) the land itself had a value of $61,000.00 [Transcript, 530]; (3) the warehouse building contained a total of 120,000 square feet [Complaint, Exhibit A]; (4) the warehouse building was built in bays and the defective construction affected only one 12,500 square foot bay [Transcript, 499]; (5) one of two possible methods could be followed to correct the defects in the building, one method being a plan presented by petitioner in certiorari [Transcript, 495] which, in the opinions of its expert witnesses, would entail a cost of between $111,088.00 and $123,102.79 [Transcripts 501 and 559]; the other being a plan presented by respondent [Transcript, 576] which, in the opinion of his expert witness, would entail a cost of only $12,240.00 [Transcript 587].

While the District Judge was authorized to accept the opinion of either of the expert witnesses, he was not required to do so, and in the circumstances he did that which he also was authorized to do—considered all of the pertinent evidence and reached his own conclusion as to the amount of petitioner in certiorari's damages.

Respectfully submitted

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